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SUBJECT: VIETNAM: PREPARING FOR THE JOINT COMMITTEE MEETING
-- REVIEW OF KEY ISSUES

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11. (SBU) Summary and Introduction: The United States and Vietnam will convene a meeting of the Bilateral Trade Agreement (BTA) Joint Committee in Hanoi, June 19-20. In preparation, Mission is providing a review of implementation issues to raise with the Vietnamese side during the discussions. In our view the most important issues are: WTO/BTA inconsistent provisions in Vietnam's new IPR law and draft regulations and continued poor IPR enforcement, clarity on how the new Common Investment Law (CIL) and Unified Enterprise Laws (UEL) are consistent with BTA provisions, confirmation that sanitary and phyto-sanitary (SPS) regulations will be science-based and not unduly inhibit trade, continued cases of use of reference pricing by Customs, and the need for regulations defining the trading/distribution rights of foreign companies. However, while continuing to note areas where implementation is lagging, we should also acknowledge the tremendous progress that Vietnam has made. End summary and introduction.

Intellectual Property Rights

12. (SBU) The new IPR law is a vast improvement over previous laws, bringing Vietnam's substantive law into closer conformity with international norms and strengthening enforcement. However, serious concerns remain:

-- Term of Copyright protection: Article 27 provides for a term of 50 years from publication for films, photos, dramatic works, applied art works, or anonymous works. For other works the term is life of the author plus 50 years. This term does not comply with the BTA, which requires that where the term of protection of a work is not based on the author's lifetime, the term must not be less than 75 years from publication or, if the work is not published within 25 years from its creation, 100 years from creation.

-- Content-Based Restrictions on Copyright Protection:
Articles 7 and 8 of the new IPR law provide that IP rights cannot "infringe upon interests of the state, the public or legitimate rights and interests of other organizations, individuals and shall not violate other applicable provisions of relevant law." In addition, the state can prohibit or limit IP rights "in order to ensure the objectives of national defense, security, people living (sic) and other interests of the nation and society ." We had hoped that regulations would narrow this language, but instead there are draft copyright implementing regulations taking this language further, confusing censorship with copyright protection by denying copyright protection to any work that might be subject to censorship. We understand that there is a new draft of the regulations, which we do not yet have, but which we hope is an improvement.

-- Overly Broad Provisions on Fair Use and Compulsory Licensing: Articles 25 (use without obtaining permission or paying royalties) and 26 (use without obtaining permission, but paying royalties) allow broad exceptions to normal IP rights. For example under Article 26, "broadcasting organizations using published works for the purpose of carrying out broadcasting programs with sponsorship, advertisements or collection of money in any form" do not need to get copyright holders' permission to broadcast works and are to pay royalties "in accordance with the Government regulations." This provision could exempt all commercial TV and radio broadcast. The draft implementing regulations do not clarify this issue.

-- Potential Conflict between Civil Code and IPR Law:
Vietnam's Civil Code also contains some IPR provisions. Article 5 of the IPR law provides that the Civil Code applies where the IPR law is silent and that in the case of conflict between the IPR law and other laws, the IPR law applies. Government officials say that in the case of a

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conflict with the Civil Code, Article 5 means that the IPR law would apply. Nevertheless, principles of statutory interpretation are still undeveloped in Vietnam and it is hard to predict how courts would rule on such a conflict.

-- Notice and takedown provisions: Neither the IPR law nor the draft Information Technology law provide adequate notice and takedown provisions for internet IPR violations.

-- Enforcement provisions: Mission has not seen draft implementing regulations on enforcement. However, the draft copyright implementing regulations provide guidance on civil (Articles 49 - 51) and administrative procedures (Article 52). Article 51 provides that in order to prove copyright ownership, a plaintiff must provide a certificate of copyright issued by COV, a certificate showing an application for copyright, or a written certification by a "socio-professional" organization. This requirement may violate BTA Article 3(2) by effectively requiring a "formality" in order to enforce copyrights. Other concerns include whether IPR law Articles 202, 214 comply with BTA requirements for disposal outside the channels of commerce; Article 214's provision for re-export of goods; and whether the new law will provide legal penalties severe enough to deter.

13. (SBU) International obligations: Vietnam has joined all the international conventions that, in the BTA, it pledged to join, except for the Union for the Protection of New Varieties of Plants (UPOV) convention. Post understands that the Ministry of Justice is evaluating a proposal to join the UPOV and that the Ministry of Agriculture and Rural Development expects that Vietnam will join this year. The new IPR law and previous regulations provide some protections for plant varieties. However, Vietnam's enforcement of its IPR obligations under international conventions is poor, as it is in general.

¶4. (SBU) Enforcement: The most important IPR issue is not the new law and regulations, but enforcement. Mission recommended that Vietnam continue to be on the 301 watch list primarily because of weak enforcement of the current laws. Legal DVDs, CDs, and software are virtually unobtainable in Vietnam. The government and SOE's are among the worst offenders. A particularly egregious violator is a digital-terrestrial service operated by the Ministry of Posts and Telematics, which illegally broadcasts overspill satellite signals to end-users for a one-time decoder box purchase fee.

Trade in Goods

¶5. (SBU) Technical Barriers to Trade(TBT)/Sanitary and Phyto-sanitary (SPS) Measures: The National Assembly is now debating a new draft law on standards and technical regulations, which should be passed in its spring 2006 session (May to June). Under the draft law, technical regulations are mandatory while standards, which can be set either by government or non-government (including foreign) entities, are voluntary. The new draft law contains BTA/WTO consistent language requiring that technical regulations and standards be based on science, look to international standards, and not unreasonably inhibit trade. It encourages transparency, allowing for public comment before a new regulation or standard is issued, and provides for procedures to contest the implementation of regulations and standards.

¶6. (SBU) In the past, U.S. businessmen have raised a number of complaints about TBT/SPS, including insufficient notice of changes in applicable regulations, lack of transparency, and uneven application of regulations. Regulations have at times lacked a sound scientific basis and been inconsistent with international norms. For example, in November 2005, the Ministry of Health imposed a blanket ban on all imports

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of chicken, ostensibly to prevent the spread of Avian Influenza (AI), although international standards do not call for a blanket ban regardless of whether the exporting country has an AI problem. On the other hand, Vietnam has made progress in its SPS regime and recently became the first country in Asia to open its market to U.S. boneless beef and offal. An SPS Enquiry Point under the Ministry of Agriculture and Rural Development (MARD) was set up in September 2005, but it will not operate until after WTO accession. MARD sent a letter to USTR requesting technical assistance in February 2006.

¶7. (SBU) Trading Rights: Vietnam has still not fully implemented BTA obligations regarding trading rights for U.S. firms because it has not yet passed the necessary implementing regulations. Implementing regulations for the Common Investment Law (CIL) and Unified Enterprise Law (UEL), which will come into effect on July 1, 2006, as well as the Commercial Law (CL), which entered into force on January 1, 2006, are now being drafted and should provide the necessary permanent legal basis for trading and distribution rights. In the meantime, a diplomatic note of July 2005 provides a temporary legal basis for trading rights for U.S. companies. The GVN had provided us in August 2005 with a point of contact for U.S. business to apply for trading rights (and distribution services rights) as permitted under the BTA. One company, Colgate Palmolive, was granted a license to import through this method, though this license was limited to a single product, and the company had to reapply to have trading rights for this product extended into 2006. The GVN appears to be interpreting its obligation here very narrowly and the application process for these rights is burdensome; it has not yet, to our knowledge, given blanket authorization to a company to directly import goods. Other companies, e.g.

Carrier and American Indochina Management (AIM), which are American-owned but Singapore and Hong Kong registered, respectively, have been told they are ineligible for these rights since they are not registered in the United States.

¶8. (SBU) Customs: Vietnam has essentially complied with its obligation to comply with WTO rules to establish a system of customs valuation based on transaction value and to ensure that other fees and charges do not exceed the cost of services rendered. We continue to hear occasional complaints of "reference pricing." These appear to be isolated incidents and seem to get resolved through a post clearance audit process, which is still pretty cumbersome. It also appears that Customs officials may resort to some sort of reference price when faced with a good that is unusual or infrequently imported, e.g. used golf clubs. Post clearance audits occasionally have the appearance of an attempt to get more money out of importers.

¶9. (SBU) Recently, FAS raised a problem regarding the use of reference prices for dried peas. (Note: The peas were of Canadian origin, although the supplier was American.) Dried peas for food or feed use come in under HS 07131090. They are properly invoiced at less than USD 300/ton. However, in the Vietnamese Customs reference-price book, all the commodities under the 0713 subheading, which include all kinds of beans and lentils as well as peas are given a USD 2/kg or USD 2,000/ton reference price. Based on the reference price, Customs rejected an invoice for imported U.S. dry peas for less than USD 300 and valued the shipment at USD 2000/ton. When the importer appealed, Customs only lowered the tariff to USD 800, still well above the actual prices. With a 30 percent tariff on dried peas, this effectively closes the market. We should question the Vietnamese about the continued existence of a reference price book and ask how it is used as well as about the role of post clearance audits.

¶10. (SBU) State Trading: According to BTA rules, state owned enterprises (SOEs) should make sales and purchases in accordance with commercial considerations. Vietnamese laws

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and regulations have removed most of the overt preferences for SOE's, but the system is still not transparent. The GVN is in the process of "equitizing" many SOEs. Generally, this simply refers to changing the form of the SOE into a shareholding company. Along with equitization, the state usually distributes some portion of the shares to workers and managers. Therefore with equitization, management and de facto state control are not necessarily changed. The shares of equitized SOEs rarely end up being offered to the public or being listed on the stock exchange or sold in arms-length, commercial transactions. Even the shares not distributed to enterprise workers or management are often sold to friends and relatives of current management. Vietnamese statistics are not consistent in defining SOEs. Often SOEs that have been equitized are included in the private sector even though the state continues to hold a majority share.

¶11. (SBU) To a certain extent, equitization appears to make enterprises act in a more commercial, market-oriented manner. A 2005 study by the GVN's Central Institute for Economic Management (CIEM) and the World Bank found that 87 percent of equitized firms reported better performance even when management did not change. In the study, the surveyed firms reported that productivity went up by 18 percent; workers' average salaries went up by 11 percent; sales increased by 13 percent and after tax profits increased by 49 percent. However, a USAID supported study, using data derived from the Provincial Competitiveness Index, found that SOEs tend to "crowd out" private companies, having more favorable access to inputs (such as finance and land) and customs in provinces where there are more SOEs.

Services

¶12. (SBU) General issues: In a number of service sectors, Vietnam made commitments, such as on percentage of U.S. equity permitted, in terms of joint ventures. However, the new Unified Law on Enterprises (UEL) no longer provides for joint ventures as a legal form of enterprise. It is unclear how Vietnam's commitments will be fulfilled under the new law. Post has heard conflicting reports on how these commitments will be treated. Some experts say that the equity percentages will simply apply to shareholding companies and other forms of enterprises under the new law. However, one expert said that proposed regulations would effectively recreate joint ventures as a form of enterprise and require U.S. companies to meet the requirements for being a joint venture before being allowed to avail themselves of their rights under the BTA. Another issue is how the rights of U.S. companies that are currently operating in Vietnam as joint ventures would be affected if and when they transform themselves into one of the forms of enterprise recognized under the UEL. Finally, a number of sectors are considered to be "conditional," e.g., subject to an approval process under the CIL. It is not clear yet what the standards for approval will be or how they will impact U.S. investors.

¶13. (SBU) Legal Services: Vietnam's National Assembly is supposed to pass a new law on lawyers in 2006. The law had its first reading in the current National Assembly session and should be passed in the fall session. Under the BTA, U.S. law firms are permitted, as of entry into force of the agreement, to establish 100 percent owned law firms, as well as joint ventures, and to consult on Vietnamese laws if the consulting lawyers have graduated from a Vietnamese law college and satisfy Vietnamese requirements. A local U.S. law firm confirmed that it was able to participate actively in Vietnam's legal market and has been able to hire Vietnamese lawyers to advise on issues of Vietnamese law. However, the GVN has split the legal profession between solicitors and barristers. The effect of this split has been to make it impossible for the law firm to use its Vietnamese lawyers to represent clients in court.

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Fortunately, the new law on lawyers is expected to abolish the distinction between solicitors and barristers.

¶14. (SBU) Market Research: The new Commercial Law does not provide regulations and the Ministry of Trade has said that it does not plan to provide separate regulations on this issue. It is therefore not clear how the Vietnamese plan to implement their BTA commitment to allow U.S. companies to avail themselves of their BTA rights. At the same time, however, we are not aware of any U.S. business interest in this sector.

¶15. (SBU) Telecom: Under the BTA, Vietnam is supposed to abide by the WTO Telecom reference paper, which requires, inter alia, an independent regulator, a pro-competitive legal framework, and cost-based interconnection fees. There have been regulations or decrees to implement some issues mentioned in the reference paper:

-- competitive safeguards (Competition Law passed in December 2004),

-- interconnection (Directive No. 07/2005/CT-BBCVT by Minister of Post and Telematics dated September 15, 2005 on network interconnection and public telecommunications services, Decision No.12/2006/QD-BBCVT dated April 26, 2006 issuing Regulation on interconnection between public telecommunications networks), and

-- universal service (Decision No. 74/2006/QD-Ttg dated April 7, 2006 approving a program on provision of public

welfare telecommunications services until 2010).

¶16. (SBU) However, many problems remain: cross-subsidization still exists although reduced considerably by Decision 191/2004/QĐ-TTg of the Prime Minister on the establishment of the Public Welfare Telecommunications Service Fund and Decision 217/2003/QĐ-TTg on management of post and telecommunications fees and prices. VNPT Group is being restructured to separate the management and finances of the individual subsidiaries and thus, theoretically, eliminate opportunities for cross-subsidization. However, even under the new structure there could be still opportunities for cross-subsidization since the VNPT Board of Management could "reinvest" profits from a profitable subsidiary to one which is not making a profit.

¶17. (SBU) MPT has made a little progress towards becoming an independent regulator. However, MPT lacks a systematic mechanism for regulating the telecom sector, which is still almost entirely state-owned. Although MPT officials do not sit on the VNPT board, a fundamental conflict of interest problem remains in that VNPT, which, while technically an SOE "owned" by the Ministry of Finance, has been "established" under MPT (other telecom players have been established by other ministries). This arrangement follows the practice for the majority of Vietnam's SOEs and presents a fundamental problem for regulatory systems in other sectors as well. Detailed regulations on transparency of interconnection arrangements or public availability of licensing criteria have not yet been issued. Decree 160 on Telecommunications discusses licensing criteria, but the criteria are not clear. Regulations on the public availability of the terms and conditions of individual licenses have not yet been issued.

¶18. (SBU) The only private Vietnamese telecom firms, of which there are a few, are non-facilities-based Voice over Internet Protocol (VoIP) providers. Mission is aware of two telecom service providers that have asked for our assistance and been in contact with USTR. (Note that a Business Cooperation Contract (BCC), a type of revenue-sharing concession that enables restricted market entry for a fixed period of time, is currently the only form of foreign investment in Vietnam's telecommunications sector.) VITC is a U.S. company with a BCC with Vietnam Post and Telecom

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(VNPT) (the telecom monopoly) to provide wholesale and retail international voice and data communications through VNPT's various subsidiaries. UTS is a U.S. VoIP provider with a BCC with Vishipel, a telecom company owned by the General Corporation for Marine Transport (an SOE). VITC sought Mission's assistance in selling 25 percent of its equity to VNPT (the deal fell apart over a disagreement over who owed whom money). UTS asked for help when its VoIP quota was reduced, but quotas have since been abolished. (See Septel on Telecom for more details.)

¶19. (SBU) Distribution: The new Commercial law, which took effect on January 1, 2006 will implement this right, but implementing regulations have not yet been issued. In the meantime, a July 2005 diplomatic note from the Ministry of Trade confirmed that it was ready to grant licenses to interested U.S. businesses. As mentioned above under trading rights, the GVN in August 2005 instituted a POC at the Ministry of Trade through which U.S. companies could apply to avail themselves of trading and distribution rights. This was meant as a stopgap measure until legislation implementing these rights was passed. Most U.S. companies we have talked to are not interested in a distribution JV in which they have only a minority share. There is only one company which has attempted to pursue a distribution JV, American Indochina Management (AIM). As noted above, AIM has been told by the GVN that it does not qualify for BTA distribution rights since it is not an American-registered company.

Investment

¶20. (SBU) The new CIL and UEL appear to have moved towards creating a level playing field for foreign and domestic companies. Under these two laws, which come into effect on July 1, 2006, both domestic and foreign enterprises are treated essentially the same. However, we have not yet had the opportunity to evaluate the draft regulations for these two laws.

¶21. (SBU) Investment Licensing: CIL Chapter IV, Section I, sets out the procedures that both foreign and domestic enterprises must follow to register an investment. Domestic enterprises do not need to register if they have investment capital less than VND 15 billion (about USD 1 million). All foreign investors must register. However, for both foreign and domestic enterprises that have less than VND 300 billion (about USD 20 million) in investment capital and do not fall into the list of conditional investment sectors, registration is a relatively simple notification process and does not require evaluation. Domestic and foreign investments over USD 20 million are subject to an approval process.

¶22. (SBU) Entry, Sojourn and Employment of Aliens: It is unclear if Decree 105/2003/ND-CP is inconsistent with Article 8 of the BTA, which states that each party shall permit nationals and companies of the other Party to transfer or engage executives, managers or those possessing specialized knowledge, subject to the laws of each party on entry and sojourn. Decree 93/2005/ND-CP, which amends Decree 105/2003/ND-CP, provides that in case a foreign invested enterprise needs to hire a number of foreigners exceeding three percent of the total laborers of the enterprise they may file an application to the local authority for consideration.

¶23. (SBU) Consensus requirement: BTA Annex H 4.2(b) allowed Vietnam to maintain until December 2004, a requirement that a limited number of important joint venture decisions (appointment or dismissal of key officers, amendments to the charter, approval of the final financial statements, and loan for investment) be decided by consensus. For U.S. companies that have been pushing to gain the right to hold a 51 percent share of joint ventures,

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dropping the consensus requirement is important to ensure that majority ownership confers meaningful control of a joint venture. There are two questions to raise about this issue. First, how will the Vietnamese implement 4.2(b) now that joint ventures no longer exist under the UEL?

¶24. (SBU) Second, how does Vietnam reconcile 4.2(b) with the supermajority provisions in the new UEL? Under the UEL all decisions by a shareholders' meeting must be made by a 65 percent majority of participating shareholders. The following decisions must be approved at a shareholders' meeting by a supermajority:

- amending of the corporate charter,
- reorganizing or dissolving the company,
- sale or investment of over 50 percent of corporate assets,
- approving the development strategy of the company,
- removing of members of the boards of management and supervision,
- deciding on classes of shares and total number of shares of each class,
- approving the annual financial statement,
- electing members of the boards of management and supervision.

Annex H does not specify what should replace "consensus" and

arguably any provision for less than 100 percent meets that requirement. However, discussions at the WTO may have made this issue moot.

¶25. (SBU) Requirement that the general director or first deputy general director be Vietnamese citizens: BTA Annex H 4(a) phased out this requirement by December 2004. In a diplomatic note dated June 8, 2005, the GVN confirmed that this requirement had been abolished. BTA Annex H 4(a) applies only to joint ventures, which will no longer exist under the new CIL and UEL, however, neither of these new laws appear to require that enterprise officers be Vietnamese citizens. It would be useful to confirm that under the new laws and their regulations, foreign invested enterprises will not face any citizen requirements for leading enterprise officers.

¶26. (SBU) Capital Requirements: BTA Annex H 4.1 phased out minimum capital requirements in December 2004. In a diplomatic note dated June 8, 2005, the GVN confirmed that this requirement had been abolished. BTA Annex H 4(a) applies only to joint ventures, which will no longer exist under the new CIL and UEL, however, neither of these new laws appear to require that foreign invested enterprises have a minimum share of capital. It would be useful to confirm that under the new laws and their regulations, foreign invested enterprises will not face any minimum capital requirements.

Transparency

¶27. (SBU) One of the great successes of the BTA has been increasing transparency in Vietnam. All legal normative documents (LND) must be published in Vietnam's Official Gazette and the Prime Minister issued Decree 161/2005/ND-CP which forbids agencies from issuing any legal norms except by means of an LND. The decree also requires agencies to send LND drafts that affect business to the VCCI for publication on its website (in Vietnamese) and to allow 20 days for comments. Previously drafts had been published, but often with little or no time for interested parties to read and comment.

¶28. (SBU) The USAID funded STAR program is working with the GVN to create an electronic version of the official gazette, which would have the same legal authority as the printed gazette. English language versions of some important laws and decrees, as well as economic information, are available

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on websites, such as the Vietnam Economic Portal (www.vnep.org.vn). A number of Vietnamese government agencies, including the Ministries of Trade and Justice, have websites with legal and economic information. The open debate over the draft CIL in fall of 2005 was an example of how much the legal process in Vietnam has changed. Foreign businesses vigorously objected to certain provisions of the law and many of their comments were taken into account, resulting in a much better law. Nevertheless, it is often difficult to obtain up-to-date information on new drafts of laws and regulations, especially in English, even those which the GVN must provide to the WTO working party. It can also be difficult to obtain economic data from the Government Statistical Office (GSO); the process is cumbersome and non-transparent and GSO charges significant fees.

BOARDMAN